Albertson's, Inc. *and* Lora Noble. Case 28–CA–16466

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 25, 2001, Administrative Law Judge Jay R. Pollack issued the attached decision.[*] The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We adopt the judge's finding that Bev Howey, Respondent's bookkeeper at Store 989, was Respondent's agent when she, in effect, instructed Teri Klewin and Lora Noble, respectively, the scan coordinator and backup scan coordinator at Store 989, not to engage in protected concerted activities. We further adopt the judge's finding that Howey's statements were attributable to Respondent and that Respondent violated Section 8(a)(1) of the Act through Howey's statements.

In brief the facts are that, as Respondent's bookkeeper, Howey's duties involved keeping the store accounts and balancing the books. But Howey had other duties, one of which was to serve as a witness when Store Manager Danny Semerjibashian met with female employees in interviews which involved discipline or counseling. It was in this capacity that Howey sat in on the May 3, 2000 meetings which Semerjibashian held, first with Klewin, and then with Noble, and it was in this context that Howey, consistent with Semerjibashian's warnings to Klewin and Noble, instructed each of them not to engage in protected concerted activities. Semerjibashian did not disavow Howey's instructions. It is in this context that we must determine whether Howey was acting as Respondent's agent when she instructed Klewin and Noble not to engage in protected concerted activities. We agree with the judge that she was.

In *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (emphasis added), the Board explained the test for determining agency status:

> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB at 426-427 (and cases cited therein). The Board considers the position and *duties* of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).
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> Although not dispositive, the Board will consider whether the statement or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority.

The dissent contends that serving as a "conduit" for management is a key element in the analysis of whether an employee is an agent of the employer, and that since Howey was not such a conduit, she was not Respondent's agent when she instructed Klewin and Noble at the May 3 meetings not to engage in protected concerted activities. We disagree with our colleague's analysis and conclusions. There is no requirement in the Board's test for agency status that an alleged employee agent must be a conduit for management in order to be found the employer's agent. Rather, as set out above, the test for agency status is whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that "employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management."

Applying this test here, we find, in agreement with the judge, that Klewin and Noble would reasonably have believed that Howey was acting for Respondent when she instructed them not to engage in protected concerted activities and that Howey's conduct is therefore attributable

[*] At JD 2:27, "Terri Klewin" should read "Teri Klewin" and at JD 4:38, "Sarah Carey" should read "Sara Carey." At JD 7:44, ". . . the same hourly wage as Noble" should read " . . . the same hourly wage as Klewin." At JD 9:40. "297 NLRB 5044" should read "297 NLRB 504."

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the remedy section of his decision, the judge found that an expunction provision was necessary to remedy the Respondent's unlawful transfer of discriminatee Lora Noble from Store 989 to Store 958. We agree. The judge included such a provision in his notice to employees, but inadvertently omitted an expunction provision from his recommended Order. We shall modify the judge's recommended Order to include such a provision.

to Respondent. In reaching this conclusion, we find it especially significant that, in describing Howey's duties, Klewin testified that Howey was "kind of the store director's right hand man" (Tr. 316), and that Noble testified that Howey "sits in on meetings as witnesses" [sic]. . . . She does everything" (Tr. 269). Thus, Klewin and Noble understood that Howey's duties and authority were substantial, and that one of her duties was to sit in as a witness at meetings which Semerjibashian held with female employees. Further, Howey was more than a mere witness here. First, she was present at the meeting at the behest of Semerjibashian, apparently in his interest, and not as a mere neutral observer. Second, her remarks were reflective of those of Semerjibashian. That is, Semerjibashian expressed his disapproval of Noble and Klewin complaining about working conditions. Indeed, he sought to separate their shifts. Third, when Howey expressed herself on the same theme, Semerjibashian did not disagree. In these circumstances, the employees would reasonably understand that Howey was reflecting the wishes of management. The fact that this may also have been her personal opinion simply means that she spoke for herself *and* management. Since her remarks were substantively 8(a)(1) violations, and since she spoke in part for management, a violation is established.

For these reasons, we adopt the judge's finding that Howey was Respondent's agent at the May 3 meetings and that her statements to Klewin and Noble are therefore atrributable to Respondent. Accordingly, we also adopt the judge's finding that Respondent violated Section 8(a)(1) through Howey's instruction to Klewin and Noble not to engage in protected concerted activities.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Albertson's, Inc., Mesa, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) of the Order:

"(a) Expunge from our files any and all references to the unlawful transfer of Lora Noble and notify her in writing that this has been done and that this unlawful discipline will not be used against her in any future personnel actions."

2. Reletter the following paragraphs accordingly.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by creating, however inadvertently, the impression that its employees' protected concerted activities were under surveillance in mid-March 2000,[1] by threatening on May 3 to split up scan coordinator Teri Klewin and backup scan coordinator Lora Noble, and by then transferring Noble from Store 989 to Store 958 on May 5.

I also agree with my colleagues, for the reasons set out in section 1 below, that Klewin is not a statutory supervisor, and that, as explained in section 2 below, there is no merit to Respondent's argument that it lacked knowledge of Klewin's and Noble's protected concerted activities when it decided to transfer Noble to Store 958. However, for the reasons set out in section 3 below, I do not agree with my colleagues that Bev Howey, Respondent's bookkeeper at Store 989, was Respondent's agent when she sat in on two May 3 meetings which Store Manager Danny Semerjibashian held first with Klewin, and then with Noble. Consequently, I would reverse the judge's findings that Howey's comments at those meetings are attributable to Respondent and that Respondent violated Section 8(a)(1) of the Act through Howey's comments at those meetings.

I. KLEWIN IS NOT A STATUTORY SUPERVISOR

I agree with the judge and my colleagues that Teri Klewin, the scan coordinator at Store 989, is not a statutory supervisor. Klewin testified that she had been a scan coordinator for 15 years and that during that time she had never exercised, or been told that she had the authority to exercise, supervisory authority (Tr. 163-174). As the judge found, while Klewin directed the work of the backup scan coordinator, first Lora Noble and, after her transfer to Store 958 on May 5, Lana Bryant, that direction was routine and did not involve the use

[3] Chairman Battista would reverse the judge's finding that the Respondent unlawfully threatened employee Noble. Although he agrees with his colleagues that the Respondent unlawfully transferred Noble, the alleged "threat" in his view consisted of the Respondent simply informing Noble that she and employee Klewin were about to be split up. The separation was unlawful because it was unlawfully motivated. The statement (that they were to be split up) was factually correct. It adds nothing to call this a separate and independent violation. Chairman Battista would not find an additional violation based on the conveyance of this factual information.

[1] All dates refer to 2000 unless otherwise stated.

of independent judgment.[2] As the judge explained, the only factor pointing to supervisory status was Klewin's participation in Bryant's discipline in June and August. In finding that this factor did not evidence the use of independent judgment to discipline or to responsibly recommend discipline within the meaning of Section 2(11) of the Act, the judge found that Semerjibashian made an independent judgment of Bryant's job performance and that Klewin's role in Bryant's discipline was merely reportorial.[3]

In contending that the judge erred in finding that Klewin was not a statutory supervisor, Respondent excepts, inter alia, to the judge's finding that Klewin's role in the issuance of written warnings to backup scan coordinator Bryant in June was merely "reportorial" and did not involve the use of independent judgment. In support of this exception, Respondent refers in its Exceptions Brief to a portion of the transcript where Semerjibashian, in response to leading questions from Respondent's counsel, testified that he would have had no way of knowing about Bryant's work deficiencies if Klewin had not reported them to him, and that it was Klewin who recommended to him that Bryant be disciplined. (R. Exh. Br. at 20; Tr. 862–863.) Respondent then asserts that after Klewin recommended that Bryant be disciplined, Semerjibashian, without making an independent investigation, asked Klewin to put her "recommendations" in writing so that he could discipline Bryant. Respondent states that in response to this request, "Klewin typed up her analysis of Bryant's performance problems, and Semerjibashian used that document to prepare two write-ups." (R. Exh. Br. at 19.) Based on these assertions, Respondent contends that Klewin exercised independent judgment in effectively recommending that Bryant be disciplined and that the judge erred in failing to find that Klewin's effective recommendation of discipline evidences that she is a statutory supervisor. I find Respondent's arguments without merit.

First, while the judge noted that Semerjibashian testified that Klewin had recommended that Bryant be disciplined and that he would not have disciplined Bryant absent Klewin's recommendation (JD sec. II,D,1, 2d par.), the judge clearly did not credit Semerjibashian's testimony, relied on by Respondent in its Exceptions Brief, that Klewin recommended Bryant's discipline. Rather, the judge implicitly credited Klewin's testimony as to the events surrounding Bryant's June discipline and found that Klewin's role was merely reportorial.

Second, while Respondent asserts that Klewin "analyzed" Bryant's performance and made disciplinary recommendations, and that Semerjibashian requested that Klewin put her analysis and recommendations in writing so that he could issue written warnings to Bryant, the documentary evidence does not support these assertions. Klewin testified that she took her handwritten notes of Bryant's job performance to Semerjibashian and that Semerjibashian then asked her to type up these handwritten notes and give them to him. Klewin typed up her notes and submitted the two "writeups" to Semerjibashian (R. Exhs. 19 and 20). These writeups are descriptive in nature. They describe Bryant's job performance, note her deficiencies, and include the comments of other officials regarding Bryant's performance. The writeups include neither an "analysis" of Bryant's performance nor a recommendation that she be disciplined. Consequently, the judge did not err in finding that Klewin's writeups were reportorial, simply noted information about Bryant's job performance, and did not involve the use of independent judgment.[4]

[2] While, as the judge noted, Klewin stated during the investigation that she was a "supervisor," and that she "supervised" Noble's work, and Noble referred to Klewin as her "supervisor" and her "boss," the use of the term "supervisor" does not establish supervisory status within the meaning of Sec. 2(11) of the Act absent evidence of such status. See, e.g., *Masterform Tool Co.*, 327 NLRB 1071, 1071–1072 (1999) (footnote omitted), where the Board, in reversing the judge's finding that two employees, Rodriguez and Zapata, were statutory supervisors, explained:

> [T]he proper consideration is whether the functions, duties, and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in Section 2(11) of the Act." Consequently, that employees may have perceived Rodriguez and Zapata to be supervisors does not, without more, confer supervisory status on them.

In view of the judge's finding that Klewin is not a statutory supervisor, I interpret the judge's statement, at sec. II,D,1, fourth par. of his decision, that "Klewin did not have to closely supervise or direct Noble's work," to mean that Klewin did not have to closely "monitor" or direct Noble's work.

[3] While Semerjibashian was the store manager at the time that Bryant was issued the two written warnings at issue in June, he left Store 989 later in June (Tr. 58). The next store manager was Don Hinton, and it was Hinton, not Semerjibashian, as the judge stated, who issued the third written warning to Bryant in August. This inadvertent error does not affect the analysis.

[4] Using the information reported in these two writeups, Semerjibashian himself prepared the two written warnings which he gave to Bryant (R. Exh. 21). Semerjibashian signed each of the warnings. Klewin also signed the warnings as a "witness" (Tr. 471). Thus, the documentary evidence supports Klewin's testimony that Semerjibashian prepared the written warnings which he issued to Bryant (Tr. 469–471). As noted above, Respondent does not disagree. Given this evidence, it is clear that the judge erred when he stated that "Klewin drafted two warning notices for . . . Bryant [and that t]he warnings were given to Bryant in Semerjibashian's office." (JD sec. II,D,1, 2d par.) Klewin prepared the writeups, which were reportorial in nature. Semerjibashian then used the information in the writeups to prepare the written warnings.

As to Respondent's contention that Semerjibashian disciplined Bryant on Klewin's recommendation without making an independent investigation, it must be remembered that in April, as explained by the judge, Division Scan Manager Antoinette Fonzo, who was Bryant's supervisor, was dissatisfied with Bryant's job performance. At the time, Bryant was the scan coordinator at Store 958. Also in April, as explained more fully below in section 2, Semerjibashian requested that Klewin and Noble be split up. Accordingly, in early May, Fonzo, pursuant to Semerjibashian's request, transferred Noble to Store 958 as the backup scan coordinator and then transferred Bryant to Store 989 as the backup scan coordinator and Noble's replacement. Thus, Bryant's transfer to Store 989 as backup scan coordinator from Store 958, where she had been scan coordinator, was a demotion. It is in this context that Klewin's testimony, which, again, I find the judge implicitly credited, must be set.

Klewin testified that after Fonzo transferred Bryant to Store 989, Fonzo "told Danny [Semerjibashian] and [Klewin], 'You guys have to document, write [Bryant] up, get rid of her.'" (Tr. 467.) Klewin further testified that Semerjibashian was keeping track of Bryant because she had been demoted and sent to Store 989. Semerjibashian "was constantly asking" Klewin about Bryant's performance. At least every other day, Danny sought out Klewin and asked Klewin, "Is she doing any better, is she doing any better.' (Tr. 469.) Set in this context, I find that Semerjibashian, in effect, conducted an ongoing investigation of Bryant's job performance from the time that Bryant started work at Store 989. Given this investigation, there was no need to conduct a further investigation of Bryant's performance after Klewin submitted her write-ups to him. Thus, in the circumstances here, the fact that Semerjibashian did not conduct an independent investigation after Klewin submitted her write-ups does not evidence, as Respondent contends, that Semerjibashian did not conduct an independent investigation of Bryant's performance. Rather, it indicates that Semerjibashian's investigation was already complete when he requested that Klewin type up her hand-written notes of Bryant's job performance and submit them to him.[5]

For all these reasons, I find that the judge did not err in finding that Klewin is not a statutory supervisor, and that Respondent's exceptions to that finding lack merit.

II. SEMERJIBASHIAN'S KNOWLEDGE OF KLEWIN'S AND NOBLE'S PROTECTED CONCERTED ACTIVITIES

At footnote 5 of his decision, the judge stated that "Semerjibashian was aware in January 2000, that Noble and Klewin were complaining about Corcoran." Respondent excepts to this finding on the ground that the evidence establishes that Semerjibashian first learned that Klewin and Noble were complaining about Corcoran in late April when Assistant Front-End Managers and admitted Supervisors Kyle Wood and Sarah Tobey informed Semerjibashian that Klewin and Noble had complained to them about Front-End Manager Amber Corcoran, and had requested that they call Respondent's 800 number to complain about her. Respondent further contends that Semerjibashian had made a request in the middle of April, i.e., before he learned of Klewin's and Noble's protected concerted activities, to Fonzo, who, as noted above, was Respondent's division scan manager, that Fonzo separate Klewin and Noble. Based on these contentions, Respondent argues that since Semerjibashian did not learn of Klewin's and Noble's complaints about Corcoran until after he requested that they be split up, the decision to transfer Noble from Store 989 could not have been unlawfully motivated. Finally, Respondent asserts that since it was Fonzo who made the decision to transfer Noble from Store 989 to Store 958, and since Fonzo was not aware of Klewin's and Noble's protected concerted activities when she made that decision, the transfer was not unlawful for this reason also. Respondent's arguments are without merit.

That Respondent knew of Klewin's and Noble's complaints about Corcoran prior to the middle of April, when Respondent contends that Semerjibashian requested that Fonzo split up Klewin and Noble, is established by the testimony of Lori Athey, an assistant front-end manager and admitted supervisor, who testified that during the period from May 1999 to May 2000, employees, including Klewin and Noble, would periodically complain to her about Corcoran (Tr. 149–152). At one point, Re-

[5] There is scant evidence regarding the discipline of Bryant in August. While the judge stated summarily that "[i]n August, Klewin recommended a third warning and a suspension for Bryant" (JD sec. II,D,1, 3d par.), Klewin's testimony does not support such a finding. Klewin testified that while she wrote the written warning (R. Exh. 22) which then Store Manager Hinton gave to Bryant on August 28 (the first time that she had ever done so), she did not recommend that Bryant be suspended. As Klewin explained, "it wasn't up to me whether she had a suspension or not. It was her third write-up so she would get a suspension for that." (Tr. 479.) When asked whether she had checked the box marked suspension on the August 28 written warning, Klewin testified: "I doubt that I did that because that's not up to me whether she's suspended or not. The third warning—you're supposed to be suspended after the third warning but that doesn't mean Don [Hinton] had to do that." (Tr. 480.) Hinton did not testify. In my view, this evidence does not support a finding that Klewin recommended a warning and suspension for Bryant in August. However, even assuming arguendo that the judge's finding is correct, and assuming that Klewin used independent judgment in making this recommendation, this one isolated instance of the exercise of supervisory authority does not establish that Klewin is a statutory supervisor. See, e.g., *Volair Contractors*, 341 NLRB No. 98, slip op. at 3 (2004).

spondent's counsel moved to strike this portion of her testimony as "very non-specific vague testimony" (Tr. 154). The judge denied the motion and admitted the testimony for the limited purpose of "establish[ing] company knowledge that employees were complaining about the supervision of Ms. Corcoran" (Tr. 155). The judge did not err in this regard.

As found by the judge, between August 1999 and May 2000, Noble had over 30 conversations with fellow employees in which Noble registered her complaints about Corcoran. As the judge further found, during the period from May 1999 to May 2000, Klewin also had several conversations with her fellow employees in which she and her fellow employees expressed their complaints about Corcoran. Given that Noble's and Klewin's complaints during the relevant period of time centered on Corcoran, and given that Semerjibashian testified that starting in January department heads complained to him that Klewin and Noble were complaining too much about operations at the store (see fn. 7 below), one can infer that the department heads informed Semerjibashian that Corcoran was a subject of these complaints. Thus, in January, as found by the judge, Semerjibashian knew of Klewin's and Noble's protected concerted activities.

In these circumstances, that Wood and Tobey told Semerjibashian in late April that Klewin and Noble were complaining to them about Corcoran does not establish, as Respondent contends, that this was the first time that Semerjibashian learned of these complaints. The evidence is otherwise.

Finally, equally without merit is Respondent's argument that since Fonzo made the decision to transfer Noble, the decision was not unlawful. Semerjibashian and Fonzo both testified that Semerjibashian requested that Fonzo split up Klewin and Noble. As shown above, Semerjibashian knew of Klewin's and Noble's protected concerted activities when he made the request, and it was, as the judge found, those activities that motivated Semerjibashian to make the request. In such circumstances, it is well established that if an unlawfully motivated action of a management official leads to adverse action being taken against an employee, the unlawful motivation may be attributed to the employer, even if the official who made the decision had no knowledge that the underlying action was improperly motivated. See, e.g., *Golden's Foundry & Machine Co.*, 340 NLRB No. 140, slip op. at 2–3 (2003) ("[i]t is well established that if a supervisor provides a false report that leads to a discharge, that supervisor's unlawful motivation is imputable to the employer, even if the official who actually makes the discharge determination is unaware of the supervisor's animus").

III. HOWEY WAS NOT RESPONDENT'S AGENT AT THE MAY 3 MEETINGS

My colleagues adopt the judge's finding that Bev Howey, Respondent's bookkeeper at Store 989, was Respondent's agent when she sat in on two meetings which Semerjibashian held separately with Klewin and Noble on May 3. Since I find that Howey was not Respondent's agent when she sat in on the May 3 meetings, I further find that the complaint allegation that Respondent, through Howey, violated Section 8(a)(1) by ordering, in effect, Klewin and Noble not to engage in protected concerted activities, must be dismissed.[6]

As explained by the judge, Howey is the bookkeeper at Store 989. In this capacity, Howey is responsible for balancing the store sales each day, compiling the payroll, balancing accounts receivable, answering the telephones, and for other office and bookkeeping functions. As part of her duties, Howey maintains confidentiality concerning employees, store sales, and company information. When Semerjibashian meets privately with a female employee for discipline or counseling, he requests that Howey be present.

On May 3, Semerjibashian summoned Klewin to his office for a meeting. At Semerjibashian's request, Howey sat in on the meeting. Klewin explained that the problems at the store were attributable to Amber Corcoran, the front-end manager. Klewin also stated that employee morale was low because of Corcoran, and that employees were afraid to speak up because of fear of retaliation. During the course of the meeting, Semerjibashian stated that he did not want to get "blind-sided," and told Klewin that he was getting complaints from other department heads about Noble and Klewin constantly complaining,[7] and he advised Klewin to schedule Noble on separate shifts.

During the course of the interview, Klewin asked Howey, who had been sitting quietly, "Can I ask you how you feel about this whole situation and what's going

[6] Par. 5(c) of the complaint alleged that Respondent "[o]n May 3, by Semerjibashian, promulgated an overly broad and discriminatory rule prohibiting its employees from discussing complaints among themselves and from calling the Respondent's telephone hotline to complain about working conditions and other terms and conditions of employment." At the third day of the hearing, however, the counsel for the General Counsel moved to amend complaint par. 5(c) by substituting Beverly Howey's name for Semerjibashian's (Tr. 497). The judge granted the motion (Tr. 498). Accordingly, and contrary to the judge's implication at sec. II, F,2 of his decision, it is only Howey's conduct at the May 3 meetings that is alleged to be unlawful. For the reasons explained below, I find, contrary to my colleagues, that Howey's conduct at the May 3 meetings was not unlawful.

[7] Semerjibashian testified that managers began to complain to him about Klewin's and Noble's complaints about store operations in January (Tr. 877–880).

on? What do you think?"[8] Having been asked her "opinion,"[9] Howey entered into the conversation. At one point, Howey stated that if anyone approached Klewin "on the aisles or whatever, just tell them you want nothing to do with whatever is going on. That your job is scan and that's it. . . . If they have a problem, then they need to go to Danny, Bruce or Sarah Carey. Go to Sarah Carey, don't call the 800 number. Go to Sarah Carey."[10] Semerjibashian neither affirmatively adopted nor disavowed Howey's comments.

After his interview with Klewin, Semerjibashian met with Noble. Howey again sat in. Semerjibashian again complained about getting "blind-sided." He told Noble that there was "too much complaining, bitching, too much this, too much that."[11] He told Noble that she and Klewin spent too much time together and that she and Klewin were about to be "split up."[12] Semerjibashian told Noble not to worry about the store and that her only concern was the scan department. During the conversation, Howey said, "Lora, the people you are talking to, and I don't know who they are, or whatever, they need to come in and see Danny. They need to, you cannot be a speaker for them because that is all hearsay. They are telling you and you are telling."[13] Semerjibashian neither adopted nor disavowed Howey's remarks.

In determining whether Howey was Respondent's agent when she attended the May 3 interviews which Semerjibashian held first with Klewin, and then with Noble, the judge first cited *Southern Bag Corp*., 315 NLRB 725, 725 (1994), where the Board set out the analysis it applies to determine whether an employee is an agent of the employer:

> The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally, *Great American Products*, 312 NLRB 962 (1993); *Dentech Corp*., 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." (Citations omitted.) *Waterbed World*, 286 NLRB 425, 426–427 (1987). As stated in Section 2(13) of the Act, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Relying on *Diehl Equipment Co*., 297 NLRB 504 (1989), the judge found that Howey was Respondent's agent at the May 3 meetings when she spoke to Klewin and Noble. In making this finding, the judge first relied on the facts that Howey "worked closely" with Semerjibashian and that "[Howey was present when Semerjibashian met with female employees for disciplinary purposes." The judge then concluded that "[i]n light of Howey's presence at these meetings and Semerjibashian's failure to disavow Howey's comments," Klewin and Noble "would reasonably believe that Howey was reflecting Respondent's policy and speaking and acting for Respondent."

Finally, having found that Howey was Respondent's agent, the judge found that "Semerjibashian's silence in response to Howey's remarks created the impression that Respondent was ordering Klewin and Noble not to engage in protected concerted activities with other employees and not to engage in protected concerted activities on behalf of other employees." The judge concluded that by this conduct Respondent violated Section 8(a)(1) of the Act.

Agreeing with the judge that Howey was Respondent's agent, my colleagues adopt his finding of these violations. Since I find, for the reasons explained below, that Howey was not Respondent's agent when she spoke to Klewin and Noble at the May 3 meetings, I further find that Howey's comments are not attributable to Respondent and that therefore Respondent did not violate Section 8(a)(1) as found by the judge.

Initially, I agree with the judge and my colleagues that the test for determining agency status under the Act is "whether, under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426–427 (1987), quoting *Einhorn Enterprises*, 279 NLRB 576 (1986). In applying this test, I am mindful that "it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency rela-

[8] R. Exh. 33, p. 11. Klewin and Noble secretly taped certain interviews and conversation that they had with management officials. Certain portions of the tapes were transcribed and introduced into evidence. R. Exh. 33 is a transcription of R. Exh. 1, the tape of the May 3 meeting between Semerjibashian and Klewin at which Howey was the witness.

[9] Klewin testified that in making this inquiry, she was asking for Howey's "opinion" on this issue (Tr. 415).

[10] R. Exh. 33, p. 16. "Bruce" is the drug manager at Store 989 and Carey is the division loss prevention manager (Tr. 416).

[11] R. Exh. 34, p. 2. R. Exh. 34 is a transcript of the tape recording (R. Exh. 8) of the May 3 meeting between Semerjibashian and Noble at which Howey served as a witness.

[12] R. Exh. 34, p. 2.

[13] R. Exh. 34, p. 12.

tionship." *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Further, "the party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful." Id.

In the present case, then, the issue is whether the General Counsel has satisfied his burden of establishing that Klewin and Noble reasonably believed that Howey was acting as Respondent's agent when she advised them not to discuss complaints amongst themselves or with other employees and not to call Respondent's telephone hotline to complain about working conditions. For the following reasons, I find that the General Counsel has failed to meet this burden.

In finding that Howey was Respondent's agent at the May 3 meetings, the judge relied solely on the facts that Howey worked closely with Semerjibashian, that Semerjibashian asked Howey to sit in on meetings with female employees where discipline or counseling was involved, and that Semerjibashian did not disavow Howey's comments. Relying on *Diehl Equipment Co.*, supra, the judge then summarily found that Howey was Respondent's agent when she told Klewin and Noble not to engage in protected concerted activity. The facts in *Diehl Equipment Co*. are, however, readily distinguishable from those in the present case. Further, although not discussed by the judge, it is those facts that provided the Board its rationale for adopting the judge's finding of agency status in that case. Since those facts, and that rationale, are absent here, the judge erred by relying on *Diehl Equipment Co*. to find that Howey was Respondent's agent at the May 3 meetings.

In *Diehl Equipment Co.*, the primary issue was whether the respondent, Diehl Equipment Company (DEC), violated Section 8(a)(3) of the Act by failing or refusing to hire certain individuals, including alleged discriminatee John Lehner, because of their support for the union. In that case, Lehner went to DEC's office where he spoke to Beryl Dyer.[14] Dyer was seated at a desk immediately inside the entrance to DEC's office. Lehner asked if any work was available. Dyer did not respond, but handed Lehner a job application and asked him to fill it out. Lehner filled out the application and returned it to Dyer. Noting that Lehner's previous employers were signatories to union agreements, Dyer commented, '''You're Union.'" Id. at 506–507. After Lehner confirmed that he was a union member, Dyer told him that DEC did not hire union help anymore, that Lehner would have to go to the union hall if he wanted employment. Lehner left. DEC never contacted him.

In finding the 8(a)(3) violation, the judge relied, inter alia, on his finding that Dyer was DEC's agent when she told Lehner that DEC did not hire union applicants and that therefore Dyer's statement was attributable to DEC. In finding that Dyer was DEC's agent when she told Lehner of DEC's policy not to hire union applicants, the judge found that as DEC's "office factotum" of nine years, Dyer "was aware of and reflected that policy in her comments to Lehner and that she possessed the apparent authority to speak on DEC's behalf and therefore spoke as DEC's agent when she advised Lehner . . . [that] DEC did not hire union members[.]" Id. at 506, fn. 15.

Significantly, in affirming the judge's conclusion that Dyer was DEC's agent, the Board relied in addition on the fact that Dyer's job "routinely involved handing job applications to individuals and receiving the completed applications from them." Id. at 504, fn. 2. Relying on this factual finding, the Board concluded that DEC "had placed Dyer in a position in which she had the apparent authority to provide information and to answer questions relative to the application forms she handled." Id. In other words, the Board found that Dyer was DEC's agent because she was, in effect, DEC's *conduit* for conveying information about applications and the processing of them. It is on this finding, i.e., that Dyer was DEC's conduit, that the Board primarily relied in affirming the judge's finding that Dyer was DEC's agent.

The finding that an employer has used an individual as a "conduit" for the conveying of information from management to employees is a "key aspect" in the analysis of whether the individual acted with apparent authority in respect to the conduct under consideration.[15]

In the present case, however, it is clear that Howey does not serve as a "conduit," i.e., one who transmits information from management to employees. Howey's job duties do not encompass such a function. While it may be that one of Howey's "duties" is to sit in as a witness when Semerjibashian meets with female employees where discipline or counseling is involved, such a role does not involve relaying information to employees. Obviously, Howey's role as a silent witness in such

[14] As the judge noted, Dyer kept DEC's books, handled payroll, typed letters, answered telephones and performed general clerical duties. Dyer also prepared the reports accompanying periodic payments into trust funds established under the Plumbing & Air Conditioning Contractors of Central and Northern Arizona (PAC) and union agreements during the time that DEC was a party to those agreements.

[15] As explained in *Mays Electric Co.*, 343 NLRB No. 20, JD slip op. at 5 (2004) (footnote omitted):

> Apparent authority results from a manifestation by the employer that creates a reasonable basis for the employees to believe that the employer has authorized the alleged agent to perform the acts at issue. A key aspect of the analysis is whether the employer has used the employee in question as a conduit for transmission of information from management to other employees.

meetings defeats any notion that this "duty" encompasses the role of a conduit for management. Thus, the judge's finding that Howey is Respondent's agent, based as it is on the mere facts that Howey, as bookkeeper, works closely in that capacity with Semerjibashian and that Semerjibashian asked Howey to sit in on meetings with female employees, is erroneous, and his reliance on *Diehl Equipment Co.*, supra, is misplaced.

Further, in the present case, unlike in *Diehl Equipment Co.*, where Dyer was unknown to Lehner, Howey was a "friend" of Klewin's, and socialized with Klewin and Noble both at work and outside of work.[16] Given this personal relationship, and the fact that Respondent never held Howey out as a conduit of information from management to employees, Klewin and Noble would reasonably have understood that by her comments at the May 3 meetings, Howey was conveying her own personal subjective views and not those of management.

That this conclusion is correct is underscored by Klewin's own testimony, as set out above, that she solicited Howey's advice because she wanted *Howey's opinion* on the issues being discussed. Obviously, since Klewin solicited Howey's opinion, she could only reasonably have understood that Howey was expressing her own personal views. In these circumstances, the fact that Semerjibashian did not disavow what were, after all, Howey's own personal views, has no place in the analysis.

For all these reasons, I find that the General Counsel has not met his burden of establishing that Howey was Respondent's agent when she spoke at the May 3 meetings with Klewin and Noble. Accordingly, I would reverse the judge's findings that Howey was Respondent's agent when she made the statements at issue in the May 3 meetings and that those statements were attributable to Respondent. I would therefore reverse the judge's finding that Respondent violated Section 8(a)(1) through Howey's statements at the May 3 meetings, and I would dismiss this allegation of the complaint.

Dated Washington, D.C., July 29, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[16] Tr. 310 and 315–316. Klewin also testified that she was concerned about Howey's health and called her "all the time," both at home and at work (Tr. 517). Likewise, Howey testified that she considered Klewin to be a "friend" (Tr. 784).

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Phoenix, Arizona on December 7, 8, and 12, 2000, and January 16, 17, and 18, 2001. On May 9, 2000, Lora Noble (Noble) filed the charge alleging that Albertson's, Inc., (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing on July 31, 2000, against Respondent alleging that Respondent violated Section 8(a) (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record,[1] from my observation of the demeanor of the witnesses,[2] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a corporation with various offices and facilities, in the State of Arizona, where it has been engaged in the retail sale of groceries and related items. Respondent annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $5000 from outside the State of Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6),and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent operates numerous retail grocery stores in the State of Arizona. Lora Noble was employed as a backup scan coordinator at Respondent's Store 989 in Mesa, Arizona. The scan department at Store 989 consisted of a scan coordinator, Terri Klewin,[3] and a backup scan coordinator, Noble. The coordinator's job is to ensure proper pricing, tagging, signing, and documenting of all store merchandise. The backup coordinator is responsible for changing prices and ensuring their accuracy. The coordinator's job is full time while the backup coor-

Richard A. Smith and *Sandra L. Lyons*, of Phoenix, Arizona, for the General Councel.

Monica L. Goebel and John B. Nickerson (Steptoe & Johnson), of Phoenix, Arizona, for the Respondent.

[1] The General Counsel filed a motion to correct the transcript on February 23, 2001. As the motion was unopposed, the motion is granted and the corrections therein are received in evidence as J. Exh. 1.

[2] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[3] Respondent contends that Klewin is a supervisor within the meaning of Sec. 2(11) of the Act.

dinator's job is part time. Respondent requires that the backup be scheduled to work during the same hours as the coordinator. Klewin as coordinator reports to the store director and the division scan manager. At the times relevant herein, Danny Semerjibashian was the store director and Antoinette Fonzo was the division scan manager.[4]

Terri Klewin has been a scan coordinator for Respondent for 15 years. She has been the scan coordinator at store 989 since the store opened in May 1999. Lora Noble was employed by Respondent from April 1997 until November 2000. Noble worked at store 989 from May 1999, until May 5, 2000, when she was transferred from store 989 to store 958, also in Mesa, Arizona. She served as backup coordinator from August 1999 until her transfer and also worked as a cashier to obtain extra hours until September 1999.

General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by creating the impression among its employees that their protected activities were under surveillance and by discouraging employees from making complaints on Respondent's employee hotline without prior approval. Further the complaint alleges that Respondent, through its bookkeeper, Beverly Howey, prohibited employees from discussing grievances amongst themselves and from calling Respondent's employee hotline. The complaint also alleges that Respondent through Semerjibashian threatened Noble with transfer and a change in work hours for engaging in protected activity. In addition, the General Counsel alleges that Respondent warned Noble to avoid discussions with other employees in response to Noble's concerted activities. Finally, General Counsel alleges that Respondent transferred Noble from store 989 because of her protected concerted activities. The employees at store 989 were not represented by any labor organization and the General Counsel does not allege any organizing activities at the store. Rather, General Counsel alleges that Noble, Klewin and other employees were engaged in protected concerted activities.

Respondent denies the commission of any unfair labor practices. Further, Respondent contends that Klewin is a statutory supervisor, and therefore, could not have engaged in protected activities under the Act. Respondent also contends that Howey was not a supervisor or agent of Respondent and, therefore, Respondent is not responsible for her remarks to Klewin. Respondent denies that Noble was engaged in any protected concerted activities. Finally, Respondent contends that Noble was transferred from store 989 to store 958 because of legitimate business reasons.

B. Facts

As stated earlier, Noble worked as a cashier at store 989 from May 1999 until September 1999. In September 1999, Noble asked Store Director Semerjibashian not to assign her any additional hours as a cashier. Noble, at that time was working as the backup scan coordinator. She had been supplementing her hours by working as a cashier. However, because Noble was unhappy with Front-End Manager Amber Corcoran, she asked not to work any more in Corcoran's department. Noble viewed Corcoran as rude to customers and employees. Further, Noble believed that Corcoran was "write-up happy" and was unfairly issuing discipline to employees.

Respondent provides an orientation and policy handbook for each new employee. The employee handbook provides, inter alia, for a complaint procedure for employees to utilize in resolving work-related problems without fear of retaliation. As part of this complaint procedure Respondent provides a toll free hotline number for employees to call and express their work-related concerns. Employees may use this hotline anonymously.

Noble spoke with employee Susan Fitton in January 2000, about Corcoran's alleged change in requiring a doctor's note for absences based on illness. In addition, Noble had at least 30 conversations concerning Corcoran with fellow employees, including Klewin, Beth Dupont, Kim Lawrence, a cashier, and coffee shop employees, only identified as Linda and Virginia. These conversations which took place between August 1999 and May 2000, centered on the employees' perception that Corcoran was rude to employees and disciplined them unfairly. Noble encouraged employees to call Respondent's hotline and complain about Corcoran. She stated that she intended to call the hotline and, that, if employees complained about Corcoran as a group, maybe Respondent would do something to correct the situation. Noble testified that some employees were anxious for corrective action but many were apprehensive about retaliation from Respondent.

Klewin had several conversations between May 1999, and May 2000, with employees, Beth Dupont, Susan Fitton, and Noble, in which the employees discussed their dislike of Corcoran's treatment of customers and employees. Klewin encouraged employees to call Respondent's hotline and complain about Corcoran. In April, Klewin encouraged Dupont to call the hotline. Klewin also discussed complaints about Corcoran with Sarah Clark, Sarah Tobey, Lori Athey, and Kyle Wood, assistant front-end managers. The parties stipulated that these assistant front-end managers were supervisors within the meaning of the Act. Noble and Klewin encouraged Wood and Tobey to call the hotline and complain about Corcoran. These two supervisors informed Semerjibashian[5] and Corcoran that Noble and Klewin were attempting to get employees, including Wood and Tobey, to call the hotline about Corcoran. Athey testified that several employees, including Noble, Klewin, and Dupont complained to her about Corcoran.

Beth Dupont was a cashier at store 989 from May 1999 until September 2000. On January 24, 2000, Dupont called the hotline to complain about Corcoran. Dupont complained that Corcoran called employees names, such as "dumb," "stupid," and "lazy," in front of customers. She also complained that Corcoran threatened to fire employees, required an employee to work in violation of the State health code, hired her sister-in-law against company policy, failed to properly follow Respondent's progressive disciplinary system, and generally was rude to customers and employees.[6] While Dupont remembered only

[4] Fonzo supervised scan coordinators and backup coordinators at 73 stores in Respondent's southwestern division.

[5] Semerjibashian was aware in January 2000, that Noble and Klewin were complaining about Corcoran.

[6] Prior to filing this complaint with the hotline, Dupont attempted to resolve these issues with Semerjibashian on at least two occasions.

calling the hotline once, Respondent's records suggest that Dupont also made an anonymous call 2 weeks earlier complaining that Corcoran called employees "stupid and lazy" in front of customers. That complaint also mentioned that Corcoran had required an employee to work with "pink eye" and had hired her sister-law without a required drug test.

In mid-March 2000, Semerjibashian, conducted a meeting with front-end managers to discuss their job responsibilities. At some time during the meeting Semerjibashian made a statement to the effect that the safe room and registers were "bugged" and employees should watch what they say. Apparently, Semerjibashian's remarks caused the assistant front-end managers to believe that the store was "bugged". In fact, the store had video surveillance throughout the store and audio surveillance at the customer service desk. The employees and supervisors were aware of those security devices. Apparently, in attempting to tell employees that the audio device at the customer service desk was sensitive and could pickup some conversations at nearby registers, Semerjibashian created the impression that the entire store was "bugged". Shortly after this meeting, several of the supervisors informed employees that Semerjibashian had informed them that all of the registers were bugged. Supervisors Clark, Tobey, and Athey all informed employees of what they believed Semerjibashian had said at the supervisors' meeting. Clark and Tobey both told Noble that the store was bugged, that the only safe place to talk was outside, and that a couple of individuals could be fired for what they had said. In the meeting, Semerjibashian had made reference to inappropriate personal remarks made about Corcoran by two of her assistant front-end managers.In response to the reports that employee conversations were bugged, Klewin sent anonymous letters on March 23 and April 14 to Respondent's corporate headquarters requesting that the recording cease immediately. As a result of Klewin's letters, Respondent's loss prevention department investigated the matter. Robert Martinez, Respondent's assistant manager for loss prevention, went to store 989 to investigate the anonymous complaints. On Martinez's second trip to the store he was accompanied by his supervisor, Sarah Carey, loss prevention manager. During their investigation, Martinez and Carey interviewed a number of employees including Dupont, Klewin, and Noble.

Dupont informed Martinez that she believed the store was bugged and further complained about Corcoran's treatment of employees. Although, Martinez reassured Dupont that the store was not bugged, Dupont was not convinced. Klewin met with Martinez and Carey. She also complained about Corcoran in addition to stating her belief that the store was bugged. Klewin was not convinced that the store was not bugged. Noble met with Martinez and Carey at her request. Noble discussed both her fear that the store was bugged and also the problems with Corcoran. Noble told Martinez and Carey that employees were fearful of coming forward because Semerjibashian always sided with Corcoran. Noble stated that employees feared retaliation if they called the hotline about Corcoran. Subsequently, Martinez issued a report of the investigation. Martinez concluded that the employees did not understand the capabilities of the store's surveillance system. According to Carey, Respondent concluded that the allegations made by the employees that their conversations were being recorded, resulted from Semerjibashian's exaggeration of the capabilities of the store's surveillance system.

In April 2000, Dupont spoke with Klewin about her continuing problems with Corcoran. Klewin told Dupont that Noble had called the hotline and complained about Corcoran. Klewin suggested that other employees should join in Noble's complaint. A few days later, Klewin gave Dupont the hotline number and Noble's case number. Dupont and Klewin distributed this information to other employees, including Fitton and a coffee shop employee.

On April 21, Klewin and Noble spoke with Kyle Wood, assistant front-end manager, about a scan report. Wood told Noble that she had too many hand-keyed items (items that were not scanned), that she was using incorrect codes, and that she could be disciplined for using them. Noble stated that she was using the correct codes and said she didn't know what codes Wood was referring to. Wood returned with a copy of a booklet maintained at the cash registers for use by cashiers. Noble told Wood that she had never seen these codes before. Klewin told Wood that these codes were unauthorized and that she could be disciplined for using them. Unbeknownst to Wood, Klewin was correct in her assertion that the codes were unauthorized and not to be used. Wood responded by informing Noble and Klewin that Corcoran had authorized the codes and was ensuring that the cashiers followed these codes. Klewin, knowing that these codes were not authorized, took a copy of the codes to send to Scan Manager Antoinette Fonzo. Shortly thereafter, Klewin sent Fonzo a copy of the codes with a brief memo asking for clarification. Fonzo called Klewin and told Klewin that Corcoran had claimed that Klewin had put the codes in the store's computer. Klewin stated that she had not put the codes in the system and believed Corcoran had done it because she was enforcing the codes and her statistics looked better because of the codes. Corcoran testified that she did not have the knowledge to enter these codes into the computer and had assumed that Klewin must have done it. Respondent concluded that these codes were entered into the computer at the time of the store's grand opening and had never been removed. Neither Klewin nor Corcoran was at fault.

On May 1, Noble called Respondent's loss prevention department and spoke with Carey. Noble asked how supposedly confidential information, revealed to Martinez and Carey, was made known to Corcoran and Semerjibashian. Later that evening, Noble called the employee hotline and restated her complaints, and those of Dupont, Fitton, and Klewin, regarding Corcoran and the recording of employee conversations.

On the morning of May 3, Semerjibashian summoned Klewin to his office for a meeting with Howey in attendance[7]. Klewin explained that the problems in the store were attributable to Corcoran's rude conduct towards employees and even Semerjibashian himself. Klewin stated that employee morale was low because of Corcoran and that employees were afraid to speak up because of retaliation. During this discussion Semerjibashian told Klewin that he was getting complaints from other department heads about No-

[7] Semerjibashian asked Howey to be present as a witness whenever he had a private discussion with a female employee.

ble and Klewin constantly complaining. He advised Klewin to schedule Noble on separate shifts so that they did not spend so much time together. Semerjibashian also stated that he was tired of being "blind-sided." Semerjibashian was embarrassed that the managers in the Employer's divisional office and in its headquarters found out about problems before he did. Klewin stated that rather than separate her and Noble, Respondent would be better off dealing with Corcoran, the source of the problem. During this conversation, Klewin asked Howey, who had not spoken earlier, for her opinion. Howey told Klewin that if any employee approached her, she should say that that she wanted "nothing to do with whatever is happening." Howey told Klewin that Klewin's job was to scan and "that's it." Howey added that if other employees had a problem they should go to Semerjibashian or Sarah Carey. Howey said employees should not call the employee hotline but, instead, should call Carey. Semerjibasian did not affirmatively adopt or disavow Howey's remarks.

After speaking with Klewin, Semerjibashian spoke with Noble, accompanied by Howey. Semerjibashian again complained about being "blind-sided." He repeatedly stated that "there's too much complaining, bitching, too much this, too much that." He repeatedly stated that Noble and Klewin had too many opinions. He told Noble that nothing was perfect that every store had some problems. Semerjibashian asserted that Noble and Klewin spent too much time together. He then told Noble that she and Klewin were about to be "split up." Semerjibashian told Noble not to worry about the store and that her only concern was the scan department. He confirmed that he might have to schedule Noble on different hours from Klewin. During the conversation, Howey said that if other employees had complaints, they should speak for themselves and that Noble should not speak for other employees. Semerjibashian did not affirmatively adopt or disavow Howey's remarks.

After leaving Semerjibashian's office, Noble called the employee hotline to complain. She received a return call from Kim Hoffman, Respondent's district sales manager. Noble told Hoffman that Semerjibashian had threatened her hours and days of work. Noble said that she was afraid that she would be transferred to another store. Noble informed Hoffman that she had encouraged other employees to call. Hoffman answered that no other employees had called the hotline. Noble then stated that she preferred not to say anything further. Hoffman replied, " I guess if that's the case, what I need for you to do is do your job and mind your own business. If something happens to you personally let me know. . . Other than that I don't want to be caught in hearsay and I don't want you to be saying that this person said that this had happened to them." Hoffman told Noble, at the end of the conversation, that he suggested that she do her job and "go on with life."

Later that same afternoon, Noble received a message that Gaylene Austin, Respondent's coordinator of EEO and Labor Relations, had called her. Noble returned the call and spoke with Austin. Noble informed Austin of Noble's earlier conversations with Semerjibashian and Hoffman and stated that she did not believe that she should speak with anyone from Respondent. Austin answered that all Respondent had was what Noble had heard second or third hand. Noble said that it didn't make sense for her to encourage people to come forward, if they were going to be retaliated against. Austin argued that Noble was hampering Respondent's investigation by speaking for other employees. Noble repeated that Semerjibashian and Hoffman had told her to mind her own business. Austin stated that Noble could not "carry the torch for people." Austin said that if employees came to Noble about their problems, Noble should tell the employees to call the employee hotline.

On May 4, Semerjibashian notified Noble that she was being transferred from store 989 to store 958. Semerjibashian told Noble that he appreciated her work at the store, that he was sorry about the transfer and that he wished she would be happy at her new store. After learning of Noble's transfer, Klewin went to speak with Semerjibashian. Klewin told Semerjibashian that she and Noble would stop talking to other employees and "drop everything" if Semerjibashian would reconsider Noble's transfer. Semerjibashian told Klewin that it was too late and that the matter was out of his hands.

C. Respondent's Defense

Respondent offered evidence that the job performance of Lana Bryant, scan coordinator at store 958, was unsatisfactory in April 2000. During this same time period, Antoinette Fonzo, division scan manager and Bryant's supervisor, also learned that Semerjibashian wished to separate Klewin and backup scan coordinator Noble. Semerjibashian did not indicate to Fonzo the reasons for this request. Fonzo testified that she assumed the reason for this was that Klewin and Noble were fooling around at work. I do not credit Respondent's attempt to argue that some practical jokes played on Semerjibashian by Noble and Klewin had any part in the transfer. Semerjibashian was very friendly with both employees and suffered the jokes in good humor. Neither employee was ever counseled about the practical jokes and Semerjibashian continued to be on very friendly terms with both employees.

Fonzo replaced Bryant with an experienced scan coordinator, Chris Courier. She also decided to transfer Noble after she replaced Bryant as scan coordinator. Bryant was made backup coordinator to relearn the scan coordinator job. Noble was transferred to store 958 and Bryant transferred to store 989. Store 958 was closer to Noble's home than was store 989. Noble received the same wages at store 958. Further, at store 958, Noble was able to work more hours than she had worked at store 989. When Noble questioned Fonzo as to why she was transferred, Fonzo told Noble that the transfer was done as a favor to Semerjibashian. I find that Fonzo made the transfer pursuant to Semerjibashian's request and as a favor to Semerjibashian. The transfer was not meant to be disciplinary in nature and did not have a negative effect on Noble's wages or benefits.

D. The Supervisory Agency Issues

Section 2(11) of the Act defines a supervisor as one who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not merely a routine or clerical nature, but would require the

independent use of judgment. To be found to be a statutory supervisor, one only must be shown to independently exercise one of the enumerated authorities.

1. Klewin

As stated earlier, Klewin was a scan coordinator for 15 years. She reported to store director Semerjibashian and division scan manager Fonzo. Klewin's basic job function was to ensure the proper pricing, tagging, signing, and documenting of all store merchandise. Klewin worked on a 40-hour week and was hourly paid. Noble worked a 24-hour week and was paid the same hourly wage as Noble. During the investigation of this case Klewin referred to herself as a supervisor, and stated "I supervised the work of Lora Noble." During the investigation and at the hearing, Noble referred to Klewin as her supervisor and as her boss.[7] Semerjibashian testified that after a short training period for Noble, the only difference between the duties of Klewin and Noble was that Klewin was a full-time employee.

During Klewin's employment as scan coordinator, Klewin had not hired, rewarded, discharged, laid off, transferred an employee or recommend that an employee be hired , rewarded, discharged, laid off, or transferred. However, in June 2000, Klewin drafted two warning notices for backup scan coordinator Lana Bryant. The warnings were given to Bryant in Semerjibashian's office. Bryant testified that she believed the notices came from Klewin because Klewin and not Semerjibashian had knowledge of these deficiencies. Further, Bryant testified that Klewin and not Semerjibashian checked her work. Klewin took photographs of Bryant's work to support the discipline of Bryant. Semerjibashian testified that Klewin had recommended the discipline for Bryant and that he would not have issued the discipline absent Klewin's recommendation.

In August, Klewin recommended a third warning and a suspension for Bryant. Klewin drafted the suspension notice, signed the notice, and was present when Semerjibashian presented the warning and suspension to Bryant. Bryant was then suspended for 1 day. Thereafter, Bryant was told by Fonzo that Bryant's days in the scan department were "limited" based on reports given by Klewin to Fonzo.

Bryant testified that her activities were directed each day by a task list given to her by Klewin. However, Klewin did not have to closely supervise or direct Noble's work because Noble was an outstanding employee. At the end of each day, Klewin checked Bryant's work. Both Bryant and Noble had to speak with Klewin before taking a day off from work.

The burden of establishing supervisory status rests on the party asserting supervisory status. *Benchmark Mechanical Contractors*, 327 NLRB 829 (1999); *Alois Box Co*., 326 NLRB 1177 (1998); *Youville Health Care Center*, 326 NLRB 495 (1998). In cases where an employee deemed a supervisor would be denied employee rights under the Act, the Board has been reluctant to find supervisory status. See e.g., *RAHCO, Inc.*, 265 NLRB 235 (1982); *Westinghouse Electric Corp. v. NLRB*, 424 F. 2d 1151 (7th Cir. 1979), cert. denied 400 U.S. 831 (1970).

It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated duties listed in Section 2(11) of the Act. *Wilson Tree Co.*, 312 NLRB 883 (1993); *Advanced Mining Group*, 260 NLRB 486 (1982). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, "the test must be the significance of her judgments and directions." *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Commercial Fleet Wash*, 190 NLRB 326 (1971).

The Board has rejected the contention that mere suggestions are effective recommendations. *Brown & Root, Inc*., 314 NLRB 19 (1994). The Board has also rejected the contention that signatures on a discipline form amounted to an effective recommendation, finding instead that such signatures were for witness purposes. *Necedah Screw Machine Products*, 323 NLRB 574 (1997). See also *Highland Telephone Cooperative*, 192 NLRB 1057 (1971) (where "crew leader" had been occasionally consulted about employee's progress and had recommended employee's raise not sufficient to establish supervisory status). An employee does not become a supervisor merely because she gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac*, supra. Nor does an employee become a supervisor because she has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968).

In the instant case, Klewin's participation in Bryant's discipline is the only factor pointing to supervisory status. However, in similar cases the Board has found that the noting of information for employee warnings is reportorial and not an indicia of supervisory authority. *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Passavant Health Center*, 284 NLRB 887 (1987). The reasoning is that no independent judgment is involved. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Cook Composites and Polymers, Co.*, 313 NLRB 1105 (1994). Here, Semerjibashian ordered Klewin to write out warnings for Bryant and that Semerjibashian and not Klewin decided what disciplinary action to take. I find that Semerjibashian made an independent judgment of Bryant's job performance and that Klewin merely reported Bryant's deficiencies as directed by Semerjibashian.

2. Howey

Beverly Howey is the bookkeeper at store 989. Howey is responsible for balancing the store sales each day, compiling the payroll, balancing accounts receivable, handling returned checks, handling receipts for the store's dry cleaning operation, answering the telephone, and a variety of other office and bookkeeping functions. As part of her duties, Howey "maintains confidentiality concerning employees, store sales, and company information." As stated earlier, when Semerjibashian meets with a female employee privately for discipline or counseling,

[7] Dupont testified that when she worked as backup scan coordinator, Klewin was her supervisor. Chris Courier, a scan coordinator for 9 years, testified that she was a supervisor.

he requests that Howey be present. Howey works closely with the store director but does not supervise any employees. Howey does not have the authority to hire, lay off, promote, transfer, grant a raise, discipline, or draft warnings. Nor is there any evidence that Howey has the authority to recommend such action.

General Counsel, realizing that Howey is not a supervisor, argues that Howey was an agent of Respondent at the May 3 meetings with Klewin and Noble.

The Board applies the common law principles of agency when determining whether an employee is an agent of the employer. *Southern Bag Corp.*, 315 NLRB 725 (1994). Apparent authority results from a manifestation by the principal to the third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, ibid.; *Beaird Industries*, 311 NLRB 768 (1993); *Albertson's, Inc*., 307 NLRB (1992). The test is whether, under all of the circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987). As stated in Section 2(13) of the Act, when making an agency determination, "the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling." *GM Electrics*, 323 NLRB 125 (1997); *Southern Bag Corp.*, supra.

In *Diehl Equipment Co., Inc.*, 297 NLRB 5044 (1989), the Board found that a bookkeeper was an agent of the employer. In *Diehl*, the bookkeeper was a 9-year employee who kept the employer's books, handled payroll, and performed various clerical duties. The bookkeeper told an applicant for employment that the respondent-employer did not hire union members. The Board found that the bookkeeper possessed the apparent authority to speak on the employer's behalf and, therefore, spoke as the employer's agent. *Diehl* supra, at 507 footnote 21.

In the instant case, Howey worked closely with Store Director Semerjibashian. She was present when Semerjibashian met with female employees for disciplinary purposes. In light of Howey's presence at these meetings and Semerjibashian's failure to disavow Howey's comments, I find that Klewin and Noble would reasonably believe that Howey was reflecting Respondent's policy and speaking and acting for Respondent.

E. The Transfer

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

In this case, Noble and Klewin were engaged in concerted activities when they discussed their dissatisfaction concerning Corcoran's supervisory methods with other employees. These discussions and calls to the employer's toll free hotline, were taken in an effort to protest and change the working conditions of employees working for and with Corcoran. Where employees seek to protest the selection or termination of a supervisor or other management officials, an analysis of whether the employees' activities are protected under the Act is fact-based and depends on whether "such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees own job interests and on their performance of the work they are hired to do." *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963). See also *Hoytuck Corp.*, 285 NLRB 904, 907 (1987). Here, I find that Noble, Klewin, Dupont, Fitton, and other employees were engaged in protected concerted activities in complaining about Corcoran's treatment of employees and customers. The protection of the protected activity does not depend upon the merit or lack of merit of the grievance. *Skrl Die Casting, Inc*., 222 NLRB 85, 89 (1976).

Respondent argues that Noble was not engaged in protected concerted activities on the ground that she was not supervised by Corcoran and that, therefore, Noble's complaints were not related to her terms and conditions of employment. First, I find that Corcoran's supervision did have a significant impact on Noble's employment. It was Corcoran's supervisory methods that caused Noble to give up part-time work as a cashier. Further, it was as a result of Corcoran's supervision that Noble was involved in the dispute concerning unauthorized codes. It is also clear that Noble and other employees believed that Corcoran was involved in bugging the store.

Second and more important, even if Noble was considered not personally affected by Corcoran's treatment of employees and customers, Noble's personal involvement in assisting Dupont and Fitton, who were more immediately affected by Corcoran's supervision, falls within the "mutual aid or protection clause" of Section 7 of the Act. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Delta Health Center*, 310 NLRB 26, 43 (1993). Nor may Respondent be absolved from liability under the Act because it acted in good faith and without union animus or a willful intent to violate the Act. The law is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions." *Fabric Services, Inc*., 190 NLRB 540, 543 (1971). See also *NLRB v. Burnup and Sims, Inc*., 379 U.S. 21 (1964) and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959). The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Continental Chemical Co.*, 232 NLRB 705 (1977), and *American Lumber Sales*, 229 NLRB 414 (1977).

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United

States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that General Counsel has made a prima facie showing that Respondent was motivated by unlawful considerations in transferring Noble. First, Noble and Klewin were engaged in protected concerted activities, for at least 4 months. Second, Respondent was clearly aware of such activities. There is strong evidence that Semerjibashian and Respondent lost patience with the activities of these employees. The transfer occurred after Noble and Klewin were ordered to cease these protected activities. Finally, Noble was not given any legitimate business reason for the transfer. Rather, she was later told that she had been transferred as a favor to Semerjibashian.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Noble's protected concerted activities. Respondent has not met its burden under *Wright Line*.

Respondent contends that Fonzo made the decision to transfer Noble and that Fonzo had no knowledge of Noble's protected concerted activities. However, knowledge of a supervisor is properly attributable to an employer. *Ready Mixed Concrete Co.*, 317 NLRB 1140 (1995); *Pinkerton's Inc.*, 295 NLRB 538 (1989); *Colson Equipment*, 257 NLRB 78 (1981). I find that the knowledge of Semerjibashian and Respondent's other managers is attributable to Fonzo. Further, I find it irrelevant that Fonzo may have had no unlawful motive. She made the transfer pursuant to Semerjibashian's request and as a favor to the store director. Under such circumstances, Fonzo would be a mere conduit, and the relevant motive would be that evidenced by Semerjibashian's words and conduct. As stated above I find Semerjibashian's conduct to be motivated by a desire to keep Klewin and Noble from concertedly complaining about terms and conditions of employment.

Respondent contends that Noble was a good employee and, therefore, her transfer to store 958 benefited Respondent's business. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co*., 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984). "The mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). I find that Respondent has shown that Bryant needed to be replaced at store 958. Bryant was demoted to a backup scan coordinator and a replacement scan coordinator was brought in. However, Respondent did not prove that either Bryant or Noble had to be transferred. I find that Respondent has failed to establish that Noble would have been transferred absent her protected conduct. Thus, I find that Respondent has failed to carry its burden under *Wright Line* and that the transfer of Lora Noble violated Section 8(a) (1) of the Act. See *Bronco Wine Co.*, 253 NLRB 53 (1981); *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

F. Independent 8(a)(1) Allegations

1. Impression of surveillance

The record shows that Klewin discussed complaints about Amber Corcoran, front-endmanager, with Sarah Clark, Sarah Tobey, Lori Athey and Kyle Wood, assistant front-end managers. Noble and Klewin encouraged Wood and Tobey to call the hotline and complain about Corcoran. Athey stated that several employees, including Noble, Klewin, and Dupont complained to her about Corcoran.

In mid-March 2000, Semerjibashian, conducted a meeting with front-end managers to discuss their job responsibilities. At some time during the meeting Semerjibashian made a statement to the effect that the safe room and registers were "bugged" and employees should watch what they say. Apparently, Semerjibashian's remarks caused the assistant front-end managers to believe that the store was "bugged." In fact, the store had video surveillance throughout the store and audio surveillance at the customer service desk. The employees and supervisors were aware of those security devices. Apparently, in attempting to tell these supervisors that the audio device at the customer service desk was sensitive and could pickup some conversations at nearby registers, Semerjibashian created the impression that the entire store was "bugged." Shortly after this meeting, several of the supervisors informed employees that Semerjibashian had informed them that all of the registers were bugged. Supervisors Clark, Tobey and Athey all informed employees of what they believed Semerjibashian had said at the supervisors' meeting Clark and Tobey both told Noble that the store was bugged, that the only safe place to talk was outside, and that a couple of individuals could be fired for what they had said. In the meeting, Semerjibashian had made reference to inappropriate personal remarks made about Corcoran by two of her assistant front-end managers.

In response to the reports that employee conversations were bugged, Klewin sent anonymous letters on March 23, and April 14, to Respondent's corporate headquarters requesting that the recording cease immediately. As a result of Klewin's letters, Respondent investigated the matter. Robert Martinez, Respondent's assistant manager for loss prevention, went to store 989 to investigate the anonymous complaints. On Martinez's second trip to the store he was accompanied by his supervisor, Sarah Carey, loss prevention manager. During their investigation, Martinez and Carey interviewed a number of employees including Dupont, Klewin, and Noble.

In determining whether an employer has created the impression of surveillance among its employees, the Board uses the test enunciated in *United Charter Service*, 306 NLRB 150 (1992). The test is whether employees would reasonably as-

sume from the statement in question that their protected concerted activities have been placed under surveillance. *South Shore Hospital*, 229 NLRB 363 (1977); *Schrementi Brothers, Inc.*, 179 NLRB 853 (1969).

I find no evidence that Respondent kept the concerted activities of its employees under surveillance. However, the remarks made by Athey and the other supervisors reasonably caused Klewin, Noble and other employees to believe that their conversations about Corcoran, the hotline, and other work conditions were under surveillance by Respondent's management. The fact that Respondent did not keep the protected activities under surveillance or intend to chill employee protected activities, does not change this conclusion. *United Charter Service*, supra. I find the supervisors' reports of surveillance of the cash registers and throughout the store tended to restrain and coerce employees in the exercise of their Section 7 rights to discuss work concerns and grievances. Accordingly, I find that Respondent inadvertently violated Section 8(a)(1) of the Act.

2. Ordering employees not to engage in protected activities

On the morning of May 3, Semerjibashian summoned Klewin to his office for a meeting with Howey in attendance. Klewin explained that the problems in the store were attributable to Corcoran's rude conduct towards employees and even Semerjibashian himself. Klewin stated that employee morale was low because of Corcoran and that employees were afraid to speak up because of retaliation. During this discussion Semerjibashian told Klewin that he was getting complaints from other department heads about Noble and Klewin constantly complaining. He advised Klewin to schedule Noble on separate shifts so that they did not spend so much time together. Semerjibashian also stated that he was tired of being "blind-sided." Semerjibashian was embarrassed that managers in the Employer's divisional office and in its headquarters found out about problems before he did. Klewin stated that rather than separate her and Noble, Respondent would be better off dealing with Corcoran, the source of the problem. During this conversation, Klewin asked Howey, who had not spoken earlier, for her opinion. Howey told Klewin that if any employee approached her , she should say that that she wanted "nothing to do with whatever is happening." Howey told Klewin that Klewin's job was to scan and "that's it." Howey added that if other employees had a problem they should go to Semerjibashian or Sarah Carey. Howey said employees should not call the employee hotline but, instead, should call Carey. Semerjibasian did not affirmatively adopt or disavow Howey's remarks.

Howey was also present for a meeting on May 3, with Semerjibashian and Noble. During the conversation, Howey said that if employees had complaints, they should speak for themselves and that Noble should not speak for other employees. Semerjibashian did not affirmatively adopt or disavow Howey's remarks.

I find that Semerjibashian's silence in response to Howey's remarks created the impression that Respondent was ordering Klewin and Noble not to engage in protected concerted activities with other employees and not to engage in protected concerted activities on behalf of other employees. I find that Semerjibashian's and Howey's conduct and actions tended to restrain and coerce employees in the exercise of their Section 7 rights to discuss work concerns and grievances. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act regardless of its motive.

3. Threats

As discussed earlier, on May 3, Semerjibashian spoke with Noble, accompanied by Howey. Semerjibashian again complained about being "blind-sided." He repeatedly stated that "there's too much complaining, bitching, too much this, too much that." He repeatedly stated that Noble and Klewin had too many opinions. He told Noble that nothing was perfect that every store had some problems. Semerjibashian asserted that Noble and Klewin spent too much time together. He then told Noble that she and Klewin were about to be "split up." Semerjibashian told Noble not to worry about the store and that her only concern was the scan department. He confirmed that he might have to schedule Noble on different hours from Klewin. As shown above, during this conversation, Howey said that if employees had complaints, they should speak for themselves and that Noble should not speak for other employees.

Based on these facts, I find that Respondent through Semerjibashian threatened Noble with a change in her work schedule and/or a transfer because she had engaged in protected concerted activities with Klewin and other employees. As found above, Respondent followed through on this threat by transferring Noble to store 958.

CONCLUSIONS OF LAW

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

1. By creating the impression that it kept the protected concerted activities of its employees under surveillance, Respondent violated Section 8(a) (1) of the Act.

2. By ordering employees not to engage in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

3. By threatening to change the work hours and/or transfer employees for engaging in conduct protected by Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act.

4. By transferring employee Lora Noble from Store #989 because of her protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Usually, I would recommend that Respondent offer Lora Noble full and immediate reinstatement to the position she would have held, but for her unlawful transfer. However, for reasons unconnected to this case, Noble voluntarily quit her employment for a better career opportunity. Thus, a reinstatement remedy is not warranted. Further, normally Respondent would be directed to make Noble whole for any and all loss of earnings and other rights, benefits and privileges of employment she may have suffered by reason of Respondent's dis-

crimination against her, with interest. Backpay would be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962). However, the record reveals that Noble did not suffer financially because of the transfer but rather had increased earnings as a result of the transfer.

Respondent shall also be required to expunge any and all references to its unlawful transfer of Noble from its files and notify Noble in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against her in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[9]

ORDER

Respondent, Albertson's, Inc., Mesa, Arizona, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that it kept the protected concerted activities of its employees under surveillance.

(b) Ordering employees not to engage in protected concerted activities.

(c) Threatening to change the work hours and/or transfer employees for engaging in conduct protected by Section 7 of the Act

(d) Transferring employees in order to discourage activities protected by Section 7 of the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Stores #989 and #958 in Mesa, Arizona, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since April 2000.

(b) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, May 25, 2001.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) of the National Labor Relations Act and has ordered us to post this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.
To organize themselves;

WE WILL NOT create the impression among its employees that we keep the protected concerted activities of our employees under surveillance.

WE WILL NOT order employees not to engage in protected concerted activities.

WE WILL NOT threaten to change the work hours and/or transfer employees for engaging in conduct protected by Section 7 of the Act

WE WILL NOT transfer employees in order to discourage activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE NOT offered reinstatement to Laura Noble to the position she would have held, but for her unlawful transfer because Noble voluntarily quit her employment with Albertson's to pursue another career. Noble suffered no monetary losses as a result of her transfer.

WE WILL expunge from our files any and all references to the unlawful transfer of Lora Noble and notify her in writing that this has been done and that the fact of this unlawful discipline will not be used against her in any future personnel actions.

ALBERTSON'S, INC.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."